STATE OF MICHIGAN

COURT OF APPEALS

ALFRED PARE, ROY MOERSCHELL, RICHARD ALKEMAN, and RETIRED DETROIT POLICE & FIREFIGHTERS ASSOCIATION, INC.,

Plaintiffs-Appellees,

v

CITY OF DETROIT,

Defendant-Appellant,

and

MICHIGAN POLICE LEGISLATIVE COMMITTEE,

Intervenor-Appellee.

UNPUBLISHED
August 18, 1998

No. 199026
Wayne Circuit Court
LC No. 95-514175 AW

Before: Markman, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from the order granting plaintiffs permanent injunctive and declaratory relief. We vacate the lower court's order and remand for further proceedings.

Plaintiffs are a class of police officers formerly employed by defendant who retired before May 1, 1995. Plaintiffs obtain their health care benefits in accordance with the terms of the collective bargaining agreement (CBA) with defendant that was applicable on their dates of retirement. Since approximately 1977, each CBA has contained language imposing a two-fold obligation on defendant in this regard: first, that defendant would provide and pay the insurance premium for "Blue Cross/Blue Shield ward service" (Article 21.B); second, that if a retiree chose alternative hospitalization medical coverage from any plan or program the union selected or defendant made available, then defendant would pay the contribution to the alternative plans or programs limited to the premium "based on the Blue Cross/Blue Shield ward service" (Article 21.H). The majority of active and retired police officers

chose alternative coverage through Bankers Life and Casualty Heath Care Insurance Company (Bankers).

In February 1995, defendant and the Detroit Police Officers Association (DPOA), the union to which plaintiffs formerly belonged, entered arbitration proceedings pursuant to 1969 PA 312 ("Act 312 arbitration"). One of the topics they addressed in arbitration was rising health care costs. The resulting arbitration award provided for the adoption of a Coalition of Public Safety Trust with Bankers, a plan known as the "COPS" plan, which retained Bankers as a carrier but with differing levels of benefits.[1] The DPOA sent retirees a letter notifying them of the COPS plan and stating that if retirees who were enrolled in the "traditional" Bankers coverage did not respond to the notice by the end of the open enrollment period, which was from April 5 to May 3, 1995, then those retirees would be automatically enrolled in the COPS plan, the "new" Bankers coverage. After the DPOA sent the notice, the deadline was extended from May 3 to May 19, 1995.

On May 18, 1995, plaintiffs brought this suit against defendant. Plaintiffs alleged that the length of time afforded for changes in enrollment had generally been two months, that the majority of the class represented by plaintiffs had received the notice only within the two previous weeks because they had been residing at their winter homes, and that approximately ten percent of the members of plaintiffs' class had not yet received the notice. Plaintiffs characterized the notice as fraudulent because many retirees would have their health care coverage benefits decreased without their consent or knowledge. Plaintiffs requested the following relief:

> 1. That a writ of mandamus or declaratory judgment issue requiring the Defendant to provide the same notice to the Plaintiffs for change of health plan carriers that has been provided in the past for every single other change of enrollment procedure, including the time intervals previously provided and the specific notice previously sent with the pension checks.
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> 2. That a writ of mandamus or declaratory judgment issue requiring the Defendant to send notice to the Plaintiffs of an open enrollment period in the same manner as all other notices have been sent and to provide the Plaintiffs with correct information regarding such plans and with a sufficient notice period to enable the Plaintiffs to make a decision.
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> 3. That the Defendant City be restrained from changing any member of Plaintiffs' class into the new Bankers Life health insurance plan on May 19, 1995, until further notice from this Court.
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> 4. That the Defendant be prevented by injunction, temporary restraining order and by declaratory relief from attempting to enforce the May 19, 1995, deadline for any transfer of any member of Plaintiffs' class into the Bankers Life new plan.

On the day plaintiffs filed their complaint, the lower court issued a temporary restraining order enjoining defendant from "transferring any member of plaintiffs' class who are presently insured with Bankers Life health insurance policy into a different health insurance policy." The court further stated

that its order would not result in any harm to defendant because "defendant will be providing health insurance in the same manner as it is presently providing." Last, the court stated that its order was to remain in effect for fourteen days.

At a hearing on June 1, 1995, defendant stated on the record that the parties had reached the following stipulation: on June 5, 1995, defendant would provide plaintiffs with a summary of the covered benefits under the COPS plan; on June 9, 1995, defendant would mail notices to the retirees that included summaries of the available health care plans and extended the open enrollment period until July 31, 1995. The parties then proceeded to argue about whether defendant would pay any additional premiums that would be required by maintaining the traditional Bankers coverage through July 31, 1995. In arguing that defendant should bear this financial burden, plaintiffs posited that defendant was liable not only for the notice violation but also for a violation of the CBA provisions under which the retirees retired. Although amendment of plaintiffs' complaint had neither been sought nor granted, plaintiffs alleged at the hearing that defendant violated its agreements with the retirees by splitting the active and retired police officers into two groups for purposes of determining the premium instead of abiding by its historic practice of determining the premium according to a combined group of the active and retired police officers. In response, defendant argued that the provision common to the retirees' agreements only obligated defendant to pay a premium based on the Blue Cross Blue Shield ward service rate and that the agreements had been silent regarding how the premiums are determined. The lower court did not make any findings of fact on the record.

On June 21, 1995, defendant filed a memorandum of law regarding the use of the combined active-retiree rate for determining health insurance premiums. Similarly, on July 2, 1995, plaintiffs filed a brief addressing whether defendant could change health insurance carriers at will, whether defendant could arbitrarily change the group of persons upon which the rate of the health insurance premium was determined, and whether a preliminary injunction should issue restraining defendant from changing the rate structure. On August 31, 1995, the lower court issued a preliminary injunction that enjoined defendant from eliminating Bankers as an alternative health insurance carrier for plaintiffs and, for purposes of determining the health insurance premium to be paid by defendant, enjoined defendant from placing the retirees in a group separate from the active police officers.

On November 22, 1995, defendant filed a memorandum of law in support of its motion for dismissal of this case, stating, among other reasons, that the relief plaintiffs sought had been realized. In turn, plaintiffs responded that "they believe the lawsuit should be closed with an order which prevents defendant from splitting the actives and retirees into separate groups for purposes of premium and which prevents defendant from withdrawing any health care coverage provided at the time the retirees retired." However, plaintiffs did not address defendant's point that plaintiffs' requested relief in the complaint was to enjoin defendant from making the changes as of May 19, 1995, not that defendant be permanently enjoined from these activities.

Plaintiffs next filed a motion for permanent injunctive relief and summary disposition, albeit without specifying under which subpart of MCR 2.116(C) they were filing their motion. Plaintiffs claimed that the question before the lower court was "whether the City can change the composition of the group in order to reduce benefits for the retirees." On April 26, 1996, after hearing the parties'

arguments on the issue, the lower court issued the order presently on appeal. The court permanently enjoined defendant "from eliminating the traditional Bankers Life health insurance as alternative health coverage for the current retirees who comprise the instant plaintiff class ('the current retirees')." The court further ordered that for purposes of determining the premium to be paid by the city on behalf of the retirees, the city was "enjoined from splitting the current retirees into a group or groups separate from the active employees who are presently members of the Detroit Police Officers Association." Last, in reference to the Act 312 arbitration award, the court ordered that:

> a. for the period May, 1995 to May, 1996, the Defendant City shall pay the combined total premium set forth in the February 20, 1995 Act 312 award. This rate does not exceed the Blue Cross Blue Shield ward rate. This combined total is set forth in the Act 312 award at pp. 100-101, Section 21(C)(1): [sic]
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> b. The obligation of pre-May 1995 retirees for contribution to payment of health insurance premium sharing, if any, shall be determined only by the contractual provisions of the relevant collectives [sic] bargaining agreements in effect at the time of that person's retirement and not by the premium sharing formula set forth in the Act 312 award.

Defendant moved for reconsideration, arguing that the lower court had granted plaintiffs relief not requested in their complaint, but the lower court denied defendant's motion.

This case has reached this Court on an anomalous record, but the precise issue defendant presents for our review is whether the lower court abused its discretion in issuing the permanent injunction in this case.[2] The decision whether to grant injunctive relief is within the sound discretion of the trial court and must be based on the facts of each particular case. *Lansing Ass'n of School Administrators v Lansing School Dist Bd of Ed*, 216 Mich App 79, 85; 549 NW2d 15 (1996). Defendant argues that the lower court should not have granted plaintiffs permanent injunctive relief because the decision in their favor requires defendant to pay plaintiffs' health insurance premiums at a rate higher than the rate required by the collective bargaining agreement in effect when plaintiffs retired. For reasons that will become obvious, we decline to address the merits of the factual issues that defendant raises as grounds for reversal, but we nonetheless agree with defendant that the lower court abused its discretion in granting permanent injunctive relief in this matter.

Plaintiffs state on appeal that "this lawsuit results from the City's attempt to change the rate structure for the retirees by providing two rate structures for active and retired policemen." However, important to our decision is recognizing that plaintiffs' complaint did not allege the combined versus split premium quagmire into which the parties and the lower court unwarily entered and which resulted in the order issuing the permanent injunction we must now review. A careful reading of the allegations in the complaint reveals that plaintiffs were bemoaning the short duration between the receipt of the notice and the conclusion of the enrollment period. Similarly, a careful reading of the relief requested in the complaint reveals that plaintiffs essentially sought two types of relief from defendant: first, plaintiffs wanted the court to require defendant to provide retirees with proper notice, i.e., notice that was proper both in terms of the length of the enrollment period as well as the thoroughness of the information upon

which retirees would make the health care decision; second, plaintiffs wanted the court to restrain defendant from enforcing the May 19, 1995 deadline and implementing the changes on that day.

Arguably, once the lower court issued its temporary restraining order, plaintiffs had realized the third and fourth forms of relief they requested in their complaint: "that the Defendant City be restrained from changing any member of Plaintiff's class into the new Bankers Life health insurance plan on May 19, 1995" and "that the Defendant be prevented by injunction, temporary restraining order and by declaratory relief from attempting to enforce the May 19, 1995, deadline for any transfer of any member of Plaintiff's class into the Bankers Life new plan." Additionally, with the parties' stipulation on June 1, 1995 about the type of notice that would be sent to the retirees, plaintiffs realized the first and second forms of relief they requested in their complaint: that defendant "provide the same notice to the Plaintiffs for change of health plan carriers that has been provided in the past for every single other change of enrollment procedure" and that defendant "send notice to the Plaintiffs of an open enrollment period in the same manner as all other notices have been sent and to provide the Plaintiffs with correct information regarding such plans and with a sufficient notice period to enable the Plaintiffs to make a decision." Thus, after these two events took place, no issues alleged by the complaint remained to litigate, and the lower court was not required to determine whether a permanent injunction should issue or whether summary disposition should be granted.[3]

A closer examination of the order on appeal demonstrates the peril of wandering into areas with inadequate procedural and evidentiary footing. We have previously stated that an injunction represents "an extraordinary and drastic act of judicial power that should be employed sparingly and only with full conviction of its urgent necessity." *Senior Accountants, Analysts & Appraisers Ass'n v Detroit*, 218 Mich App 263, 270; 553 NW2d 679 (1996). In determining when to exercise such extraordinary powers, courts must determine whether the party seeking an injunction has established the following three core elements: (1) does justice require that the court grant the injunction; (2) will a real and imminent danger of irreparable injury arise if an injunction is not issued; and (3) does an adequate remedy at law exist. *Id.*

Plaintiffs' subsequent argument that defendant violated its CBA with the retirees by splitting the active and retired police officers into two groups for purposes of determining the premium constitutes a simple breach of contract action. "Failure to carry out a promise to do a future act does not constitute actionable fraud; instead, the remedy, if any, lies in a suit for breach of contract." *Michigan National Bank v Holland-Dozier-Holland Sound Studios*, 73 Mich App 12, 18; 250 NW2d 532 (1976). If plaintiffs had amended their complaint to so indicate, then the lower court would have been required to determine, as a matter of contract interpretion, whether the phrase common to the agreements with defendant applicable on plaintiffs' dates of retirement, "the premium based on the Blue Cross/Blue Shield ward service," incorporated explicitly or implicitly an understanding of how the premiums would be determined or whether the CBA was silent on the issue. As evidenced by the lower court's ability to enter an order on April 24, 1997, specifying not only the dollars but also the cents that defendant owed in health insurance premiums for May 1995 through February 1997, plaintiffs possessed an adequate remedy at law by action for damages for breach of contract. Therefore, permanent injunctive relief is plainly improper.

Additionally, summary disposition in this case was plainly improper. First, plaintiffs had realized the relief they sought in their complaint when the lower court issued its orders; therefore, there was, in effect, no complaint remaining to dismiss in either party's favor. Second, the very minimal discovery conducted by the parties in this case meant that the court decided the motion on the basis of counsels' arguments and without the aid of depositions or testimony. Moreover, there remained genuine issues of material fact precluding summary disposition. For example, there remains a disputed issue of fact regarding defendant's role, if any, in splitting the group between active and retired police officers for purposes of determining the premium. Not only has defendant argued that it did not split the rates, defendant has also argued that it did not ask Bankers to make such a change. In defendant's response to plaintiffs' request for injunctive relief, defendant attested that Bankers unilaterally withdrew its traditional coverage in favor of the COPS plan after the Act 312 arbitration. In its motion to dismiss, defendant also queries whether plaintiffs' suit should have been brought against Bankers, not the city.

In summary, neither the pleadings nor the scant record in this case permitted the lower court to determine whether a permanent injunction should issue or whether summary disposition should be granted. Plaintiffs obtained the relief they requested of the court in their complaint.

Vacated and remanded for further proceedings. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] Intervenor, which is an organization composed of representatives from police labor unions, created the COPS trust and moved to intervene to protect its interest in the operation of the trust.

[2] Because of our resolution of this issue, we decline to review the remaining issue defendant raises on appeal, which is whether the lower court should have denied intervenor relief because intervenor did not file a claim or present proofs requisite for such relief.

[3] We recognize that MCR 2.601 gives trial courts broad powers to grant relief to a prevailing party, even if the party has not demanded that relief in the pleadings. See *Allstate Ins Co v Hayes*, 442 Mich 56, 67-68; 499 NW2d 743 (1993); *Michigan Bell Telephone Co v C & C Excavating Co*, 87 Mich App 758, 766-767; 276 NW2d 487 (1979) (concerning former GCR 1963, 518.3). See also MCR 2.605(F). However, the relief granted must be supported by the evidence. *Michigan Bell, supra* at 767 (citing *Tomei v Bloom Associates, Inc*, 75 Mich App 661; 255 NW2d 727 (1977) and *Livingston v Krown Chemical Mfg, Inc*, 394 Mich 144; 229 NW2d 793 (1975)). The record in this case did not support the lower court granting relief beyond that demanded in the pleadings by plaintiffs.